DAN VAN MECHELEN,	:	Order Affirming Decision
Appellant	:	
	:	
v.	:	
	:	Docket No. IBIA 00-4-A
PORTLAND AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	July 19, 2000

Dan Van Mechelen (Appellant) appeals from a September 14, 1999, decision of the Portland Area Director, Bureau of Indian Affairs, denying Appellant's request to gift convey his 1/3 interest in a 40-acre portion of Quinault Allotment 117-2253 1/ to his brother Donald Van Mechelen (Donald). For the reasons discussed below, the Board affirms the Area Director's decision.

Quinault Allotment 117-2253 was the original allotment of Helen Brown Van Mechelen, who was the mother of Appellant, Donald, and Juanita Van Mechelen Clark. 2/ In 1970, Helen Van Mechelen gift conveyed a 40-acre portion of her allotment to Donald. 3/ The transaction was approved by the Superintendent, Western Washington Agency, BIA, on February 18, 1970.

Helen Van Mechelen died prior to September 1996. Her three children each inherited a 1/3 interest in the 40-acre portion of her allotment which she still owned at her death.

In August 1997, Appellant and Juanita Clark applied to the Superintendent, Olympic Peninsula Agency, BIA, to gift convey their 1/3 interests to Donald.

1/ This is a tract described as the SW1/4 NW1/4, sec. 28, T. 21 N., R. 11 W., Willamette Meridian, Grays Harbor County, Washington.

2/ Appellant and his sister Juanita also received allotments on the Quinault Reservation, but Donald did not.

3/ This tract is described as the NE1/4 NW1/4, sec. 28, T. 21 N., R. 11 W., Willamette Meridian, Grays Harbor County, Washington.

In their review of the applications, Agency staff learned that Donald is a member of the Cowlitz Tribe 4/ and has 1/8 degree Indian blood. They therefore questioned whether he was eligible to receive a gift conveyance in trust status. Appellant argued that Donald was an eligible recipient. However, on May 10, 1999, the Superintendent denied Appellant's gift conveyance application on the grounds that Donald had not shown that he qualified as an Indian for the purposes of acquiring land in trust. 5/ Appellant appealed to the Area Director, who affirmed the Superintendent's decision on September 14, 1999.

On appeal to the Board, Appellant contends that Donald satisfies the second part of the definition of "Indian" in section 19 of the Indian Reorganization Act (IRA), 25 U.S.C. § 479, and is therefore eligible to have land taken into trust for him under section 5 of the IRA, 25 U.S.C. § 465. 6/ For this contention, Appellant relies in part on the Board's decision in Brown v. Commissioner of Indian Affairs, 8 IBIA 183, 87 I.D. 507 (1980).

In Brown, the Board held that present Appellant was eligible to receive a gift conveyance of land in trust status under the second part of the definition in 25 U.S.C. § 479 even though he did not reside within the boundaries of any Indian reservation on June 1, 1934. 7/ The Board based its holding on a theory of "constructive residence" which it found applicable to

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4/ At the time of the Area Director's decision at issue here, the Cowlitz Tribe was not a Federally recognized Indian tribe. Since then, the Assistant Secretary - Indian Affairs has published his "Final Determination To Acknowledge the Cowlitz Indian Tribe." 65 Fed. Reg. 8436 (Feb. 18, 2000). However, because the Quinault Indian Nation has sought reconsideration, the Assistant Secretary's determination is not final for the Department.

5/ Apparently, the Superintendent did not explicitly deny Juanita Clark's application although he sent her a copy of his decision denying Appellant's application.

6/ 25 C.F.R. § 479 provides:

"The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood."

25 C.F.R. § 465 provides:

"The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians."

7/ Like Donald, Appellant is a member of the Cowlitz Tribe and has 1/8 degree Indian blood.

Quinault allottees who were living on June 1, 1934, "in light of the unique history of land ownership and Federal-Indian relations on the Quinault Reservation." 8 IBIA at 196, 87 I.D. at 512.

Appellant concedes that Donald did not reside within the boundaries of an Indian reservation on June 1, 1934, and is not a Quinault allottee. He contends, however, that the Board did not restrict its "constructive residence" holding in Brown to allottees. He contends that, under Brown, Donald is qualified to receive a gift conveyance in trust status because he was living on June 1, 1934, and was eligible to receive an allotment on the Quinault Reservation, although he never received one.

The Board rejects Appellant's interpretation of Brown. The Board stated in that case: "[W]e hold that any Indian who was allotted land on the Quinault Reservation and who was living on June 1, 1934, constructively satisfies the residence requirement of [25 U.S.C. § 479]." 8 IBIA at 197, 87 I.D. at 515. The Board's intent to restrict the scope of its decision, if not made clear enough by the sentence just quoted, is underscored by the Board's explicit refusal to extend its decision to "any Indians possessed of trust allotments on the Quinault Reservation." 8 IBIA at 198-99, 87 I.D. at 515. The Board finds that Brown applied only to Quinault allottees living on June 1, 1934.

In any event, the holding in Brown has been superseded by BIA's promulgation of regulations governing acquisition of land in trust. These regulations, now found in 25 C.F.R. Part 151, were published on September 18, 1980, 45 Fed. Reg. 62036, and became effective on October 20, 1980. The BIA decision under review in Brown was issued on September 21, 1979, at a time when there were no regulations on the subject of trust acquisitions. Thus, both the BIA and Board decisions in Brown dealt only with the statutory definition of "Indian" in 25 U.S.C. § 479.

As stated in 25 C.F.R. § 151.1, the regulations in 25 C.F.R. Part 151 "set forth the authorities, policy, and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes." For purposes of these regulations, "Individual Indian" is defined in 25 C.F.R. § 151.2(c) to include:

> (1) Any person who is an enrolled member of a tribe; [8/]
>
> (2) Any person who is a descendent [sic] of such a member and said descendant was, on June 1, 1934, physically residing on a federally recognized Indian reservation;

8/ "Tribe" is defined in 25 C.F.R. § 151.2(b), in relevant part, as "any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians, including the Metlakatla Indian Community of the Annette Island Reserve, which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs."

(3) Any other person possessing a total of one-half or more degree Indian blood of a tribe;

(4) For purposes of acquisitions outside of the State of Alaska, Individual Indian also means a person who meets the qualifications of paragraph (c)(1), (2), or (3) of this section where "Tribe" includes any Alaska Native Village or Alaska Native Group which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs.

The definition in 25 C.F.R. § 151.1(c) applies to trust acquisition decisions made after October 20, 1980. Under this definition, in order to be eligible for trust acquisitions as a "descendant," an individual Indian must have been "physically residing on a federally recognized Indian reservation on June 1, 1934." The wording of subsec. 151.2(c)(2) does not allow for the "constructive residence" interpretation adopted in Brown.

Appellant contends that the definition in subsec. 151.2(c)(2) is invalid because the phrase "physically residing" does not appear in the statutory definition of "Indian" in 25 U.S.C. § 479. Appellant seeks to persuade the Board to disregard the regulation.

The Board has no authority to disregard a duly promulgated regulation or to declare such a regulation invalid. E.g., Edwards v. Portland Area Director, 29 IBIA 12, 13 (1995); Danard House Information Services Division, Ltd. v. Sacramento Area Director, 25 IBIA 212, 218 (1994). Thus, the Board is bound by the definition of "Individual Indian" in 25 C.F.R. § 151.2(c).

The Board finds that Donald does not fall within the definition of "Individual Indian" in 25 C.F.R. § 151.2(c).

Appellant also contends that BIA's approval of the 1970 gift conveyance recognized Donald as an Indian under the IRA and that BIA's 1970 determination on that point was final for the Department.

Agency records apparently do not show how or even whether BIA made a determination in 1970 concerning Donald's eligibility to receive a gift conveyance in trust status. It appears most likely that BIA simply failed to consider the question of Donald's eligibility. Even if BIA made a specific eligibility determination in 1970, as Appellant contends it did, that determination would not control the present decision because it predated BIA's promulgation of the regulations which now govern determinations of eligibility for trust acquisitions. Given the discretionary nature of BIA's trust acquisition authority, Donald has no right to have land taken into trust for him. Thus BIA's 1970 approval of a gift conveyance did not give him a right to permanent eligibility for trust acquisitions in derogation of the present regulations.

The Board finds that Donald is not eligible to have land taken into trust for him at this time. 9/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Director's September 14, 1999, decision is affirmed.

Anita Vogt
Administrative Judge

Kathryn A. Lynn
Chief Administrative Judge

9/ If and when the Assistant Secretary's acknowledgment of the Cowlitz Tribe becomes final, Donald will presumably be an eligible recipient under 25 C.F.R. § 151.2(c)(1).

The record indicates that Appellant has expressed a wish to have his proposed gift conveyance completed promptly in light of his advanced age. Appellant may wish to consider preparing a will devising his interest to Donald and/or depositing an executed gift deed with BIA with a request that BIA approve the deed, retroactively if necessary, if and when acknowledgment of the Cowlitz Tribe is finalized.

If Appellant takes this second step, BIA should ensure that it keeps careful records concerning the request. See Estate of Mary Dorcas Gooday, 35 IBIA 49 (2000), for an example of the problems that can arise when BIA fails to maintain adequate records concerning gift deed applications.